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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1968

No.

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EUGENE HOLDEN, *et al.*,

*Plaintiffs and Appellants,*

*vs.*

ROGER ARNEBERGH, *etc., et al.*,

*Real Parties in Interest and Respondents.*

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# JURISDICTIONAL STATEMENT

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**(Rule 13(2) and 15)**
**Rules Of The United States**
**Supreme Court**

(a) This is a joint appeal taken from the order of the California Supreme Court, dated October 17, 1968, denying a hearing on the decision and order of the Court of Appeal of the State of California, Second Appellate District, Division One, dated August 21, 1968, affirming the judgment of the Superior Court below dismissing the subject action and assessing costs against plaintiffs and appellants. The order of the

Los Angeles Superior Court dismissing the action and assessing costs as aforesaid was dated March 20, 1967.

As indicated above, the California Supreme Court denied a hearing in the instant case without opinion. The opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, is reported at 265 A.C.A. 103, and 71 Cal.Rptr. 401. The opinion of the Court of Appeal is appended hereto as Exhibit "A." The order of the California Supreme Court, dated October 17, 1968, denying a hearing is appended hereto as Exhibit "B."

(b) The jurisdiction of the Court is invoked on the grounds, *inter alia*, that California Government Code section 951(b) has been sustained against a claim of unconstitutionality under the federal Constitution. Other questions raised also invoke federal constitutional questions and invoke the jurisdiction of this Court. (See *infra*.)

(i) On November 14, 1966, appellants filed a complaint for declaratory relief, injunction and conspiracy. In essence, appellants alleged that they were engaged in the business and occupation of selling books and periodicals in the City and County of Los Angeles and that various law enforcement agencies in said city and county arrested them on various dates for violations of California Penal Code section 311.2 (exhibiting and selling obscene material). Appellants alleged that the arrests were made in a manner which violated the First, Fourth and Fourteenth Amendments to the United States Constitution. The primary basis for appellants' contention that the arrest procedures were constitutionally offensive was that the officers arrested appellants and seized the allegedly obscene material without having a search

or arrest warrant and without first subjecting the allegedly obscene material to judicial scrutiny and review. Appellants' action for declaratory relief was brought pursuant to the provisions of California Code of Civil Procedure section 1060. Appellants' cause of action for an injunction was brought pursuant to the provisions of California Code of Civil Procedure section 526 *et seq.*

(ii) On March 20, 1967, the Superior Court of the State of California, for the County of Los Angeles, entered an order dismissing appellants' action and assessing costs against appellants. On March 28, 1967, appellants filed their notice of appeal. On August 21, 1968, the Court of Appeal of the State of California, Second Appellate District, Division One, affirmed the judgment and order of the Superior Court. A petition for rehearing was denied by the Court of Appeal on September 3, 1968. On October 17, 1968, the California Supreme Court denied a hearing on the decision and order of the Court of Appeal. Appellants' Notice of Appeal to this Court was filed in the Court of Appeal of the State of California, Second Appellate District, on November 18, 1968.

(iii) The jurisdiction of this Court is conferred by Title 28, United States Code section 1257.

(iv) For case authority conferring jurisdiction upon this Court, see:

1. Appellate Jurisdiction: *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed. 184, 187; *James Stewart & Co. v. Sandrakula,* 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596, 127 ALR 821; *Lambert v. California,* 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228.

2. Generally, as to subsidiary questions

involving constitutional issues: *Scott v. Donald,* 165 U.S. 58, 170 S.Ct. 265, 41 L.Ed. 632.

3. California Government Code section 951, by permitting costs to be recovered by a claimant in an amount unrelated to the actual cost incurred by the claimant, in fact imposes a penalty upon appellants for filing a lawsuit, and, therefore, said section is unconstitutional in violation of Amendment Fourteen to the United States Constitution: *Giacco v. Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 5 L.Ed.2d 447.

4. A constitutional issue is not rendered moot because of the repeal of the statute challenged, since appellants herein will suffer adverse consequences under the statute as it read prior to this appeal: *Ginsberg v. New York,* 390 U.S. 629, 663, Note 2, 88 S.Ct. 1274, 20 L.Ed.2d 195; *Peyton v. Rowe,* 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426; *Carafas v. LaVallee,* 391 U.S. 234, 237-238, 88 S.Ct. 1556, 20 L.Ed.2d 554; *Sibron v. New York,* 392 U.S. 40, 50-58, 88 S.Ct. 1889, 20 L.Ed.2d 917.

5. The requirement of a prior adversary proceeding: *Cotting v. Goddard,* 183 U.S. 79, 22 S.Ct. 30, 46 L.Ed. 92; *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *United Public Works v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *Oklahoma Operating Company v. Love,* 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596; *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1237, 12 L.Ed.2d 809; *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469; *Marcus v. Property Search Warrants,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S.Ct. 1328, 9 L.Ed.2d 405; *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484; *Dombrowski v. Pfister,*

380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 222.

6. Prior restraint: *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; *Marcus v. Property Search Warrants, supra; A Quantity of Books v. Kansas, supra; Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L Ed. 2d 584; *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

7. The requirement that law enforcement officers were required to have warrants prior to seizing allegedly obscene material and arresting persons for selling and exhibiting such material: *Metzger v. Pearcy*, 393 F.2d 202; *cf. Flack v. Municipal Court*, 66 Cal.2d 981, 59 Cal.Rptr. 872, 429 P.2d 192.

8. Declaratory relief is the proper remedy to utilize in order to obtain a judicial declaration concerning the obscenity or non-obscenity of specific books, magazines and photographs: *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal. Rptr. 800.

(v) California Government Code section 951 is found in Stats. 1963, c. 1715, p. 3383, sec. 2, and reads as follows:[1]

> "(a) At any time after the filing of the complaint in any action against a public employee or former public employee, if a public entity undertakes to provide for the defense of the action, the attorney for the public employee may file and serve a demand for a written undertaking on the part of

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1. Government Code section 951, as quoted in the jurisdictional statement, was in effect at the time the instant action was filed and constituted authority for assessing costs against appellants. In 1968 (Stats. 1968, c. 384, p.-, sec. 2) the California Legislature deleted that portion of section 951 which authorized the awarding of costs to respondents in the instant case.

each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of the demand therefor, his action shall be dismissed.

"(b) If judgment is rendered for the public employee or former public employee in any action where a public entity is not a party to the action but undertakes to provide for the defense of the action, allowable costs incurred in defending the action, but in no event less than fifty dollars ($50), shall be awarded against each plaintiff.

"(c) This section does not apply to an action commenced in small claims court."

California Penal Code section 1524 is found in Stats. 1957, c. 1884, p. 3289, sec. 1, and reads as follows:

"A search warrant may be issued upon any of the following grounds:

"1. When the property was stolen or embezzled.

"2. When the property or things were used as the means of committing a felony.

"3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.

"4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

"The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

California Penal Code section 1539 (as said section read prior to its amendment in 1967) is found in Stats. 1851, c. 29, p. 285, secs. 658, 659, and reads as follows:

"If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in Section 869."

California Penal Code section 1540 is found in Stats. 1851, c. 29, p. 285, sec. 660, and reads as follows:

"If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

(c) The questions presented on appeal are as follows:

(i) Whether California Government Code section 951, by permitting costs to be recovered by a public entity who prevails in a lawsuit in an amount unrelated to the actual costs incurred by such public entity in said lawsuit, is unconsti-

tutional in violation of Amendment Fourteen to the United States Constitution, in that said seciton imposes a penalty upon a private person for filing a lawsuit against the public entity (or an employee of the public entity for whom the latter provides a defense)?

(ii) Whether the court below properly sustained demurrers to the first cause of action of appellants' second amended complaint, thereby ruling that appellants' allegations that the law enforcement agencies involved in this case were required to have warrants prior to seizing allegedly obscene material and arresting persons for selling and exhibiting such material were invalid and incorrect?

(iii) Whether the court below properly sustained demurrers to the second cause of action of appellants' second amended complaint, thereby ruling that appellants were not entitled to a declaratory judgment on the issue of whether certain specific books, magazines and photographs attached to appellants' second amended complaint were obscene or non-obscene?

(d) **Statement of the case:**

On November 14, 1966, appellants filed a Complaint For Declaratory Relief, Injunction and Conspiracy (CT 1-15).[2] In essence, appellants alleged that they were engaged in the business and occupation of selling books and periodicals in the City and County of Los Angeles and that various law enforcement agencies in said city and county arrested them on various dates for violations of California Penal Code section 311.2 (exhibiting

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2. As used herein, CT refers to the Clerk's Transcript on Appeal, and ST refers to the transcript relating to the Supplemental Appeal filed by appellants on April 17, 1967.

and selling obscene material). Appellants alleged that their arrests were made in a manner which violated the First, Fourth and Fourteenth Amendments to the United States Constitution. The primary basis for appellants' contention that the arrest procedures were constitutionally offensive was that the officers arrested appellants and seized the allegedly obscene material without having a search or arrest warrant and without first subjecting the allegedly obscene material to judicial scrutiny and review.

On November 21, 1966, appellants filed a Notice of Motion for Preliminary Injunction, Declaration and Points and Authorities in Support Thereof (CT 16-36). On December 2, 1966, Harold W. Kennedy, County Counsel of the County of Los Angeles, filed a Demurrer to Complaint for Declaratory Judgment, Injunction and Conspiracy and Points and Authorities in Support Thereof (CT 37-40). One ground of the demurrer was that the complaint failed to state a cause of action.

On December 5, 1966, Roger Arnebergh, City Attorney for the City of Los Angeles, filed Points and Authorities and Declarations of Roger Arnebergh, City Attorney, Thad F. Brown, Chief of Police, and Edward L. Davenport in Opposition to Plaintiffs' Request For Preliminary Injunction (CT 41-51). Attached to this document was the "Decision, Findings of Fact and Conclusions of Law" in United States District Court Case No. 66-784-AAH (CT 54-74).

On December 23, 1966, appellants filed their First Amended Complaint for Declaratory Judgment, Injunction and Conspiracy (CT 82-97). Although the first cause of action of the first amended complaint was somewhat revised, the basic alleged constitutional violations remained intact. Additionally,

appellants set forth a second cause of action in which they requested a declaration as to whether a number of specifically described books, magazines and photographs (paragraph 2, CT 91-92) were or were not obscene.

On January 4, 1967, Harold W. Kennedy, County Counsel for the County of Los Angeles, filed a Demurrer To Amended Complaint for Declaratory Judgment, Injunction and Conspiracy and Point and Authorities in Support Thereof (CT 98-99). Again, one ground for demurrer was that the complaint failed to state a cause of action.

On January 18, 1967, Thomas C. Lynch, Attorney General for the State of California, filed a Demurrer to Amended Complaint for Declaratory Judgment, Injunction and Conspiracy and Points and Authorities in Support Thereof (CT 100-101). The basis of this demurrer was that the complaint failed to state a cause of action.

On January 25, 1967, Roger Arnebergh, City Attorney for the City of Los Angeles, filed a document entitled "Demurrer of Real Party in Interest Roger Arnebergh, City Attorney, and Thad F. Brown, Chief of Police, to Plaintiffs' First Amended Complaint" (CT 102-104).

On February 27, 1967, appellants filed their Second Amended Complaint for Declaratory Relief and Injunction (CT 105-117). Although there was again some revision of the complaint, the alleged constitutional violations remained intact and a declaration as to whether the specifically described books, magazines and photographs were or were not obscene was again requested.

On March 6, 1967, Evelle J. Younger, District Attorney for the County of Los Angeles, and Peter J. Pitchess, Sheriff of the County of Los Angeles, filed a Demurrer of County

Officers to Second Amended Complaint and Points and Authorities (CT 118-119).

On March 8, 1967, Roger Arnebergh, City Attorney for the City of Los Angeles, filed a Demurrer of Real Parties in Interest Roger Arnebergh, City Attorney, and Thad F. Brown, Chief of Police, to Plaintiffs' Second Amended Complaint (CT 120-122).

On March 10, 1967, Thomas C. Lynch, Attorney General for the State of California, filed a Demurrer to Amended Complaint for Declaratory Judgment, Injunction and Conspiracy, and Points and Authorities in Support Thereof (CT 123-124).

On March 20, 1967, the Superior Court of the State of California, for the County of Los Angeles, the Honorable Richard L. Wells, Judge Presiding, entered the following order:

> "Good cause appearing therefor, the above-entitled action is hereby dismissed under the provisions of section 581(3) of the Code of Civil Procedure as to defendants Evelle J. Younger, District Attorney for the County of Los Angeles; Peter J. Pitchess, Sheriff of the County of Los Angeles; Roger Arnebergh, City Attorney for the City of Los Angeles; Thad Brown, Chief of Police for the City of Los Angeles; and Thomas J. Lynch, Attorney General of the State of California.
>
> "It is further ordered that the above named defendants have and recover costs against the plaintiff in the sum of $_____"

On March 28, 1967, appellants filed their Notice of Appeal and Designation of Record (CT 126-127).

On March 30, 1967, Evelle J. Younger, District Attorney

for the County of Los Angeles, and Peter J. Pitchess, Sheriff of the County of Los Angeles, filed a Memorandum of Costs and Disbursements, each claiming costs of $50.00 against each appellant pursuant to the provisions of Government Code section 951 (ST 1-4). "Points and Authorities in Support of Defendant's Motion of Costs Under Section 951 Government Code" were also filed (ST 5-7).

On March 30, 1967, appellants filed a Notice of Motion to Strike Memorandum of Costs and Disbursements Or, In The Alternative, Reducing the Costs Recoverable by Real Parties in Interest to the Actual Amount of Costs Incurred By Said Parties; Points and Authorities in Support Thereof (ST 8-13). This motion was denied on April 13, 1967 (ST 14).

On April 17, 1967, appellants filed a Supplemental Notice of Appeal and Designation of Record (ST 15-16).

(e) The primary federal question presented in this appeal concerns the claim by appellants that California Government Code section 951 is unconstitutional. It is respectfully submitted that Government Code section 951, by permitting costs to be recovered by a claimant in an amount unrelated to the actual costs incurred by the governmental entity claimant, in fact imposes a penalty upon appellants for filing their lawsuit, in violation of Amendment Fourteen to the United States Constitution. In effect, Government Code section 951 permits recovery of $50.00 in costs against each appellant, irrespective of the actual amount of costs incurred by the claimant. The provisions of section 951 have the practical effect of imposing a penalty upon appellants for filing the lawsuit against the public employee, since the governmental entity employing the public employee is entitled to recover costs in excess of the sum

expended by it. It is submitted, therefore, that section 951 is constitutionally violative.

It is worthy to note that the code section pursuant to which costs were assessed against appellants in this case, to wit, California Government Code section 951, was, as indicated above, amended in 1968. The effect of the amendment was to delete that portion of section 951 which authorized the awarding of costs in cases such as the instant one. In spite of the fact that the section has been amended as indicated, the issue herein raised by appellants has not been rendered moot, for the reason that if the cost assessment provision is upheld, appellants will be required to pay the costs assessed, since the assessment occurred prior to the amendment of the section. It is respectfully submitted that a constitutional issue is not rendered moot because of the repeal of the statute challenged if the party challenging the statute will suffer adverse consequences under the statute as it read prior to the appeal. *Cf. Ginsberg v. New York, supra; Peyton v. Rowe, supra; Carafas v. LaVallee, supra; Sibron v. New York, supra.*

As indicated above, the trial court sustained demurrers to the first cause of action of appellants' second amended complaint on the ground that the complaint failed to state a cause of action. The appellate court affirmed the order of the trial court. It is submitted that both courts erred in making their respective determinations.

Appellants alleged in their complaint that the law enforcement agencies were required to have warrants prior to seizing allegedly obscene material and arresting persons for selling and exhibiting such materials. The court, in sustaining the demurrers without leave to amend and dismissing the action, rejected appellants' allegations. It is respectfully submitted that the court

erred, in that law enforcement officers are required to obtain a warrant prior to arresting a person and seizing allegedly obscene material. *Metzger v. Pearcy, supra; Flack v. Municipal Court, supra.* Accordingly, the allegations contained in appellants' first cause of action stated a cause of action.

The court also sustained demurrers without leave to amend to the second cause of action of appellants' second amended complaint, wherein appellants sought a judicial determination as to whether certain specific books, magazines and photographs were obscene. It is respectfully submitted that the court erred in so holding, since it is well established that declaratory relief is the proper remedy to utilize in order to obtain such a judicial determination. *Zeitlin v. Arnebergh, supra.*

(f) Appended hereto as Exhibit "B" is a copy of the order appealed from; the opinion of the Court of Appeal is appended as Exhibit "A."

## CONCLUSION

It is respectfully submitted that Government Code section 951, insofar as it permits recovery of $50.00 in costs against each appellant irrespective of the actual amount of costs incurred by the individual claimant, in fact imposes a penalty upon appellants for filing their lawsuit and is, therefore, violative of the Fourteenth Amendment to the United States Constitution. In addition, it is submitted that the court below erred in sustaining demurrers to the first and second causes of action of appellants' second amended complaint (in effect dismissing said complaint), for the reasons hereinabove set forth.

Respectfully submitted,

BURTON MARKS

*Attorney for Appellants*

# APPENDIX

## OPINION OF THE COURT BELOW

EXHIBIT "A"

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

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EUGENE HOLDEN, JOE BRANDON, JOHN ROSAKOS, NATHAN DeLUCA, JOSEPH GROSS, JOSEPH RICHARD TOUART, HAROLD HOLDEN, MARK S. HOLDEN, BERNARD SWEENY, WILLIAM BLAIR MILES and HENRY BRANDON,

*Plaintiffs and Appellants.*

*vs.*

ROGER ARNEBERGH, City Attorney for the City of Los Angeles; EVELLE J. YOUNGER, District Attorney for the City of Los Angeles; THAD BROWN, Chief of Police of the City of Los Angeles; PETER J. PITCHESS, Sheriff of the County of Los Angeles and THOMAS C. LYNCH, Attorney General of the State of California,

*Real Parties in Interest and Respondents.*

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Civ. 32155, 32197

Court of Appeal, Second District
Division 1

August 21, 1968

LILLIE, Associate Justice.

Having been arrested and charged with violating section 311.2, Penal Code (exhibiting and selling obscene material),

plaintiffs by their second amended complaint, first cause of action, sought a declaratory judgment that the statute as applied by the real parties in interest deprives them of rights guaranteed by the First, Fourth and Fourteenth Amendments, United States Constitution, and that real parties be required to set up a pre-arrest censorship system by which they (plaintiffs) could submit the material in question for a determination as to its asserted obscenity prior to seizure and prior to their arrest; and in their second cause of action, a further declaration that the various materials (books, magazines and photos) are not obscene as a matter of law and, therefore, not the subject of criminal prosecution, and injunctive relief against further prosecution for selling and exhibiting such books and photos. Demurrers having been sustained, plaintiffs appeal (No. 32155) from order dismissing the action (Code Civ. Proc. sec. 581(3)). They also appeal (No. 32197) from order denying their motion to strike cost bill of certain real parties fixed in the sum of $550 pursuant to section 951(b), Government Code.[1]

The first cause of action purports to set forth the existence of a controversy between plaintiffs and the several real parties. Plaintiffs allege among other things[2] that they are in the book-selling business; that in September 1966 all were arrested for violating section 311.2, Penal Code, and one month later certain of them were again arrested; that prior to arrest and seizure of any items offered for sale by them, real parties

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1. "If judgment is rendered for the public employee * * * in any action where a public entity is not a party to the action but undertakes to provide for the defense of the action, allowable costs incurred in defending the action, but in no event less than fifty dollars ($50), shall be awarded against each plaintiff."

2. In many respects they are patterned after the pleading in Schackman v. Arnebergh (D.C. 1966) 258 F.Supp. 983, wherein the court denied petitioners any relief and dismissed the action as to all law enforcement officers concerned.

were required as a matter of procedural due process to give notice and warning that such items have either been declared obscene within the meaning of section 311, Penal Code, by certain sections or divisions set up in the offices of the several real parties for such determinations, or submitted for judicial scrutiny by an appropriate court; that instead, real parties resort to the following procedures: A policeman or deputy sheriff enters plaintiffs' place of business, buys a book he thinks is obscene, takes the item thus purchased either to a deputy city attorney or deputy district attorney who, with or without consulting another deputy, thereupon determines whether the material is "prosecutable." A complaint is then drawn up for issuance by the applicable municipal court without first submitting the material to the magistrate; in the alternative, the policeman or deputy sheriff is directed to return to plaintiffs' place of business and make an arrest, without a warrant, upon the premise that the officer can then reasonably believe that a misdemeanor is being committed in his presence. An arrest is then made, either without a warrant or pursuant to a warrant issued by the municipal court; thereafter a search of the premises is made, and items considered incriminating are seized. Since the above procedures were applied to them, plaintiffs contend, and real parties deny, that section 311.2, Penal Code, as thus enforced violates their rights guaranteed by the First (freedom of speech), Fourth (freedom from unreasonable searches and seizures) and Fourteenth (equal protection of the laws) Amendments.

The second cause of action makes reference to the arrests of plaintiffs and appropriately identifies the various items charged to be obscene; it then alleges that a dispute has arisen as to the obscenity of these items and as to their (plaintiffs')

right to protection from prosecution under the First Amendment. It is further alleged that a judicial determination should be made of their nonobscenity, after viewing the several films and reading the subject books, following which an injunction should issue barring further prosecution of plaintiffs by the real parties for exhibiting and selling said materials.

Citing *Flack v. Municipal Court,* 66 Cal.2d 981, 59 Cal. Rptr. 872, 429 P.2d 192, it is first contended that plaintiffs' first cause of action sufficiently stated a cause of action for the relief therein sought insofar as it alleged that the concerned officers were required to obtain warrants prior to any arrests and seizures. As to the second cause of action, appellants, relying on *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 31 Cal. Rptr. 800, 383 P.2d 152, 10 A.L.R.3d 707, claim that the demurrer should not have been sustained because it is now settled that an action for declaratory judgment will lie to determine the alleged obscenity of a book or other material[3] under the applicable statutes. Based on the following, it is our view that here there is substance to neither contention.

In *Flack* petitioners were arrested by police officers after the latter had viewed a certain film exhibited at a theater owned by Flack who employed the other petitioner (Stephenson); contemporaneous with the arrests, the film was seized. Neither search nor arrest warrants had previously been secured. The next day each was charged with violating seciton 311.2, to which count of the complaint a demurrer was thereafter overruled. Motions to suppress and for return of the film were subsequently denied, after which petitioners sought mandamus

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3. Films may also be included within the free speech and free press guaranty of the First and Fourteenth Amendments. (Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.)

requiring return of the film. It was concluded that "the procedures employed in the present matter do violence to those [First Amendment] constitutional protections," (66 Cal.2d p. 983, 59 Cal.Rptr. p. 873, 429 P.2d p. 193) and the trial court was accordingly directed to issue the writ as prayed. What were the procedures employed in *Flack*? The arrests and seizures were made without a search warrant, although the film had been exhibited at the same public theater for two weeks, and they were effected by "police officers in the field" who made an *ad hoc* determination of obscenity contrary to the following *caveat* found in the opinion: "Within the precinct of the First Amendment, only the requirement that a search warrant be obtained prior to any search or seizure assures a free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field." (P. 992, 59 Cal.Rptr. p. 879, 429 P.2d p. 199) Although disapproving contrary conclusions on this point found in cases cited in the footnote (fn. 12), in a subsequent footnote (fn. 13) the court expressly declined under the facts there presented to "ascertain whether it is feasible for the magistrate to examine the allegedly offending film or hold an adversary proceeding prior to issuing a warrant * * *." (P. 993, 59 Cal.Rptr. 880, 429 P.2d p. 200.)

More pertinent to the problem at bar is the following from *Aday v. Municipal Court*, 210 Cal.App.2d 229, 26 Cal.Rptr. 576 (which case is cited with approval in *Flack*): "As applied to the facts in hand, the *Marcus* ruling[4] requires a holding that the seizure must be followed expeditiously with a court hearing, if desired by the owners, and a prompt determination of whether

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4. Marcus v. Search Warrants of Property, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127.

the property or some specified portion of it shall be returned to the persons from whom seized." (P. 248, 26 Cal.Rptr. p. 588.) Under California law such relief is made available to persons thus aggrieved by the provisions of sections 1539 and 1540, Penal Code, the purpose of which "is to provide one whose property is seized with a speedy remedy in a readily accessible court, * * *" (*Aday v. Superior Court*, 55 Cal.2d 789, 800, 13 Cal.Rptr. 415, 422, 362 P.2d 47, 54); too, it is immaterial whether the property was illegally seized by means of an invalid warrant or without any warrant at all. (*People v. Gershenhorn*, 225 Cal.App.2d 122, 37 Cal.Rptr. 176.) In the present case, as disclosed by their complaint, although plaintiffs were first arrested (and their property seized) on September 21, 1966, the instant action was not commenced until November 14 of that year, and the pleading is completely silent respecting resort to the available procedures, referred to above, which could have furnished redress in the manner provided by the applicable statutes; and even if the motion to return and/or suppress had been denied, such order could have been more expeditiously reviewed (as was done in *Flack*) by a proceeding in mandamus to compel the result desired.

[1, 2] Having sought declaratory relief, plaintiffs are now confronted with the recognized principle that the granting of such relief rests in the sound discretion of the court. (*People v. Ray*, 181 Cal.App.2d 64, 67, 5 Cal.Rptr. 113) *Ray* holds (citing authority) that the court does not abuse its discretion in refusing to entertain that type of action where otherwise plaintiff has a speedy and adequate remedy. Both *Flack* and the two *Aday* cases have described the procedures to which plaintiffs have not resorted as "speedy" and "expeditious" means of redress; under the circumstances, we do not believe

that plaintiffs have made any showing that the present proceeding should be considered an exception to the general rule above stated.

[3, 4] We apply the same rationale to plaintiffs' second contention that under the ruling in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152, 10 A.L.R.3d 707, they are entitled under the second cause of action as pleaded to a judicial determination respecting the obscenity of the items seized and to an injunction prohibiting further prosecution of the criminal proceedings therein referred to. Thus, insofar as that course of action seeks a declaratory judgment, a timely (and successful) motion to suppress might well have removed the several materials from judicial consideration, thus ending the People's case. With regard to injunctive as well as declaratory relief, real parties have cited *Manchel v. County of Los Angeles*, 245 Cal.App.2d 501, 54 Cal.Rptr. 53, which did not, as here, involve a challenge to the unconstitutional application of a legislative enactment. With respect to the issuance of an injunction, the correct rule is stated in *Bueneman v. City of Santa Barbara*, 8 Cal.2d 405, 407-408, 65 P.2d 884, 886, 109 A.L.R. 895: " 'It is settled that where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement. * * * Hence, if the ordinance is unconstitutional in its application to these plaintiffs, they are entitled to the decree which they seek.' " However, real parties correctly contend that the same principle governs actions for injunctive relief as is applicable in proceedings for a declaratory judgment, namely, there must be some showing of the inadequacy of a remedy at law affording proper grounds for the equitable relief sought. In *North Side etc. Assn. v. Hillside etc.*

*Park,* 70 Cal.App.2d 609, 161 P.2d 618, affirming a judgment on the pleadings, this court declared: "* * * it is well recognized doctrine that where a party has an adequate remedy at law he may not resort to a court of equity for injunctive relief [citations]." (P. 615, 161 P.2d p. 621.)

[5] In the second appeal (No. 32197), plaintiffs challenge the order below refusing to strike the cost bill of certain real parties upon the ground that the subject statute (fn. 1, *supra*) in practical effect imposes a penalty upon them for filing their lawsuit and, therefore, is violative of the Fourteenth Amendment. They rely on *Giaccio v. State of Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447, wherein, upon the ground of vagueness, the court struck down a statute providing that in a criminal case the jury could decide, upon defendant's acquittal, the proportionate costs (if any) to be borne by him. The trial court had instructed the jury that it could place costs of prosecution on defendant, even if acquitted of the charge, if it found that he had been guilty of " 'misconduct of some kind as a result of which he should be required to pay some penalty short of conviction * * *' " (p. 404, 86 S.Ct. p. 521.) That the decision was based upon the lack of any ascertainable standards definitive of the type of misconduct in suit, there can be no doubt. The California statute, of course, is otherwise, providing that costs of not less than $50 per plaintiff be borne in the event his suit is not successful. Further, it has been held that former section 647, Government Code, similar in part to the statute under consideration, was not open to the constitutional challenge here asserted (*Reid v. State ex rel. Dept. of Public Works, Division of Highways,* 193 Cal.App.2d 799, 806, 14 Cal.Rptr. 597); too, since *Reid* was one for an injunction, it also answers the additional point that the instant lawsuit, being equitable in

nature, is not an "action" within the meaning of section 951.

The orders are affirmed.

WOOD, P.J., and FOURT, J., concur.

**EXHIBIT "B"**

(2d Civ 32155, 32197, Div 1)

HOLDEN, *et al. v.* ARNEBERGH, CITY ATTORNEY, *etc.*, *et al.*

[265 A.C.A. 103.]

**ON PETITION FOR HEARING**

**ORDER**

Appellants' petition for hearing denied. Peters, J., is of the opinion that the petition should be granted.

DATED: October 17, 1968.

# PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
County of Los Angeles )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on JANUARY , 1969, I served the within JURISDICTIONAL STATEMENT (Holden v. Arnebergh) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

COUNTY CLERK, COUNTY OF LOS ANGELES
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA
FOR: HONORABLE RICHARD L. Wells, Judge

ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012

DISTRICT ATTORNEY, COUNTY OF LOS ANGELES
600 HALL OF JUSTICE
LOS ANGELES, CALIFORNIA 90012

COUNTY COUNSEL, COUNTY OF LOS ANGELES
650 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012

CITY ATTORNEY, CITY OF LOS ANGELES
200 NORTH SPRING STREET, RM. 2100
LOS ANGELES, CALIFORNIA

I swear under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1969, at Los Angeles, California.

---

D. A. Standefer

Orig. & 40 copies via Air Express to
CLERK, UNITED STATES SUPREME COURT
1 FIRST STREET, N.E., WASHINGTON, D.C.

Subscribed and sworn to before me
this day of January, 1969.

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Notary Public in and for the
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IN THE

# Supreme Court of the United States

October Term, 1968
No. 945

EUGENE HOLDEN, JOE BRANDON, JOHN ROSAKOS, NATHAN DeLUCA, JOSEPH GROSS, JOSEPH RICHARD TOUART, HAROLD HOLDEN, MARK S. HOLDEN, BERNARD SWEENY, WILLIAM BLAIR MILES, and HENRY BRANDON,

*Plaintiffs and Appellants,*

*vs.*

ROGER ARNEBERGH, City Attorney for the City of Los Angeles; EVELLE J. YOUNGER, District Attorney for the City of Los Angeles; THAD BROWN, Chief of Police for the City of Los Angeles; PETER J. PITCHESS, Sheriff of the County of Los Angeles; THOMAS J. LYNCH, Attorney General of the State of California,

*Real Parties in Interest and Respondents.*

## MOTION TO DISMISS OR AFFIRM.

ROGER ARNEBERGH,
*City Attorney,*
ROBERT B. BURNS,
*Assistant City Attorney,*
JOHN A. DALY,
*Assistant City Attorney,*
GEORGE J. FRANSCELL,
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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

# Supreme Court of the United States

October Term, 1968
No. .....

EUGENE HOLDEN, *et al.*,

*Plaintiffs and Appellants,*

*vs.*

ROGER ARNEBERGH, etc., *et al.*,

*Real Parties in Interest and Respondents.*

## MOTION TO DISMISS OR AFFIRM.

Respondents Roger Arnebergh, City Attorney for the City of Los Angeles and Thad Brown, Chief of Police of the City of Los Angeles, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal heretofore filed with this Honorable Court in the above entitled case be dismissed, or, in the alternative, that the final judgment and decree of the Court of Appeal of the State of California, Second Appellate District, Division One, as reported 265 ACA 103 and 71 Cal.Rptr. 401 be affirmed on the grounds that:

(a) That the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to these rules.

(b) That it does not present a substantial federal question.

(c) That the judgment rests on adequate non-federal bases.

## Statement.

Appellants appeal from an order of the California Supreme Court denying a hearing on the decision and order of the Court of Appeal of the State of California, Second Appellate District, Division One, dated August 21, 1968, affirming the judgment of the Superior Court below in dismissing a complaint for declaratory relief, injunction and conspiracy and awarding costs.

## ARGUMENT.

(a) No substantial federal question is presented in that as to these respondents the Jurisdictional Statement (page 12) affirmatively shows that costs were filed and claimed by respondents Evelle J. Younger and Peter J. Pitchess but no costs were filed or claimed by these respondents and as to them the constitutionality of California Government Code Section 951 is moot.

(b) No substantial federal question is presented as to these respondents as to the legality of the arrests allegedly made under their direction, in that in appellants' complaint for declaratory relief, injunction and conspiracy [C. T. 82-97] appellants allege that they were "arrested in the manner set forth in paragraph XIV of their first cause of action" which paragraph XIV alleged that

> ". . . an arrest is made by a policeman either without a warrant or on the basis a warrant is issued by a magistrate of the applicable municipal court pursuant to a complaint filed. . . ."

The instant case involves a total of approximately 17 separate novels or paperbacks, sexual photos and an undeterminate number of films, all of which were available to appellants in multiple copies. As described in Paragraph XI, First Cause of Action of Plaintiffs' Second Amended Complaint—the material involved was legally purchased or obtained prior to any arrest, and reviewed as to its obscenity or non-obscenity by the prosecuting authorities designated by state law to decide the question for the purpose of initiating prosecution. (Section 26500 *Government Code*; Section 691 *Penal Code*; Section 42(8) of the *Los Angeles Charter;* Section 72193 *Government Code.*) Whether or not the arrest should be made on the basis of the material legally obtained and reviewed, whether to proceed by warrant or otherwise was the decision of the prosecuting attorney and his staff, not the sole decision of the arresting officer.

Considering the vast amount of material of this type that is flooding the country in the form of novels, paperback books, magazines, advertising pamphlets, so called comic-books—underground newspapers, picture books and photographs, any decision by a Court to equate the procedure followed in this case with the peremptory arrest in *Flack* or the wholesale seizures in *Marcus v. Search Warrant,* 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708; *Stanford v. Texas,* 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506; *Aday v. Superior Court,* 210 Cal. App. 2d 229; or *A Quantity of Books v. Kansas,* 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723, raises the following questions which must be resolved by the Court.

1. Will the task of reviewing each one of the hundred of items now reviewed by the prosecuting attor-

neys and their staff, be so burdensome to the courts, considering the crowded condition of their calendars, that they will be unable to act and to do so will in effect be an abdiction of responsibility owed to the public at large to control the spread of pornography?

2. Can the Courts afford to provide the time and the judicial personnel necessary to review the vast amount of trash publications that comprise much of the questionable material? (See A Report To The California Legislature dated April 6, 1967 from the Attorney General Thomas C. Lynch.)

3. Will the Court's preemption of the tasks now assigned by statutory law to prosecuting attorneys in deciding what is or it not obscene, add anything to true freedom of speech and press or will it result in more inability to agree as has been demonstrated by the decision in *Redrup v. New York,* 386 U.S. 767 and the fourteen separate opinions handed down the same day by the United States Supreme Court in *A Book Named "John Cleland's Memories of a Woman of Pleasure et al. v. Attorney General,* 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975; *Ginsburg v. United States,* 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 and *Mishkin v. State of New York,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958.

Examples of the quantities of books, magazines and other publications involved in some of the decisions cited in *Flack v. Municipal Court, supra,* are set forth in those decisions. In *Marcus v. Search Warrant, supra,* there were 280 publications; in *Aday v. Municipal Court,* 62 publications; in *Stanford v. Texas, supra,* approximately 2000 publications; in *Quantity of Books*

*v. Kansas, supra,* some 31 publications; in *Mishkin v. State of New York, supra,* some 72 paperback publications.

4. There is no constitutional requirement of judicial filtering of police judgment on probable obscenity prior to lawful arrest and seizure of allegedly obscene materials where the volume and quantity of such material renders prior judicial scrutiny a barrier to public protection.

See:

*Schackman v. Arnebergh* (1966), 258 F. Supp. 983;

*Pinkus v. Arnebergh* (1966), 258 F. Supp. 996.

5. No law enforcement official is required to give guidelines and opinions regarding possible obscenity nor is any law enforcement official required to provide a board of review to pass on the obscenity or lack thereof of material.

See:

*Schackman v. Arnebergh* (1966), 258 F. Supp. 983;

*Pinkus v. Arnebergh* (1966), 258 F. Supp. 996.

6. The California Supreme Court in ***Flack v. Municipal Court,*** 66 Cal. 2d 981, at 993 (f.n. 13) expressly declined under the facts there presented to

> "ascertain whether it is feasible for the magistrate to examine the allegedly offending film or hold an adversary proceeding prior to issuing a warrant . . . ."

(c) The judgment and decree of the Court of Appeal in affirming the judgment of the Superior Court below rests on adequate non-federal grounds, in that:

(1) Declaratory and injunctive relief were properly denied.

"Where the Plaintiff has another remedy that is speedy and adequate, and as well suited to Plaintiff's needs as declaratory relief, it is proper to refuse declaratory judgment." (*People v. Ray,* 181 Cal. App. 2d 64; *Broffman v. Klassman,* 183 Cal. App. 2d 117; *Walker v. Munro,* 178 Cal. App. 2d 67; *Wieber v. Worton,* 105 Cal. App. 2d 626; and 15 *Cal. Jur.* 2d "Declaratory Relief", Section 23 at page 142).

This same principle is applicable in suits for injunctive relief (*Manchel v. County of Los Angeles,* 245 Cal. App. 2d 501, and *Citizens' Committee for Old Age Pension v. County of Los Angeles,* 91 Cal. App. 2d 658).

Appellants had available to them a Motion to Suppress and/or Return the Material Seized (Sections 1539 and 1540, *Penal Code*). In addition, this remedy is also available where the material in question has been seized without a warrant (*People v. Gershenhorn,* 225 Cal. App. 2d 122) and the fact that the subject matter of the pending lawsuit was a misdemeanor prosecution matters not. (*People v. Justice Court,* 185 Cal. App. 2d 256).

If the Motion to Suppress were denied, the moving party need not rely upon a time-consuming appellate procedure, but might apply directly for a Writ of Mandate (*People v. Gershenhorn,* 225 Cal. App. 2d 122).

Thus, wherease here the Appellants in the criminal prosecution had the constitutional, as well as statutory right, to a speedy trial and likewise had available to them the right to petition for a Writ of Mandate, they, the Appellants, had another remedy that was as speedy, if not more so, and as adequate and as well suited to their needs as this action for declaratory and injunctive relief.

The procedures afforded by California law for the enforcement of Penal Code Section 311.2 meet constitutional requirements of due process.

> "If the procedure prescribed by the State actually affords the character of due process contemplated by the federal Constitution, and is followed, there is no denial of the right under the federal constitution. While if it does not, or is not followed, the right has been violated. Smith v. State of Texas, 311 U.S. 128, 61 S. Ct. 114, 85 L. Ed. 84; Hill v. State of Texas, 316 U.S. 400, 62 S. Ct. 1159, 86 L.Ed. 1559." (*Mueller v. Powell* (C.A. 8, 1953), 203 F. 2d 797, 800).

California laws relating to arrests and searches meet the fundamental criteria and standards required by the federal Courts in applying Constitutional standards. (*Ker v. California* (1963), 374 U.S. 31, 10 L. Ed. 2d 726, 83 S. Ct. 1623.) While denial of a motion to return, like denial of a motion to suppress is not reviewable on appeal, a discretionary review by writ of mandate is available (*People v. Gershenhorn,* 225 Cal. App. 2d 122, 124-126).

California obscenity statutes, as amended in 1961, are in accord with the constitutional requirements laid

down and discussed in *Mishkin v. New York,* ..... U.S. ....., 86 S. Ct. 958, 16 L. Ed. 2d 56, and *A Book named John Cleland's Memoirs v. Attorney General,* .... U.S. ...., 86 S. Ct. 975, 16 L. Ed. 2d 1. As stated in *Mishkin* at page 61, "The New York Courts have interpreted

> "'obscenity in §1141 to cover only so called 'hard core pornography' See *People v. Richmond County News, Inc.,* 9 NY 2d 578, 586-587 . . . Since that definition of 'obscenity' is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below".

The same statement, but substituting Penal Code Section 311.2 and *Zeitlin v. Arnebergh,* 59 Cal. 2d 901 for the statute and case cited, can be said of the California Courts and the constitutionality of its obsecnity laws.

The California statute, by use of the word "knowingly" defined therein to mean "having knowledge that the matter is obscene" satisfies the constitutional requirement of scienter as pointed out in *Smith v. California* (1959), 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215. (*Mishkin v. New York* (*supra*), 16 L. Ed. 2d at pages 62, 63).

The control of obscenity by criminal prosecutions, under proper standards, is constitutional (*Alberts v. California,* 354 U.S. 476, 495, 1 L. Ed. 2d 1498, 1513, 77 S. Ct. 1304; *Kingsley Books v. Brown,* 354 U.S. 436, 440, 1 L. Ed. 2d 1469, 1473, 77 S. Ct. 1325). A state is not limited in the remedy it selects so long as due process is observed (*Kingsley Books v. Brown*

(*supra*), cited in part in *Times Film Corp. v. Chicago* (1961), 365 U.S. 43, 50, 5 L. Ed. 2d 403, 408, 81 S. Ct. 391).

Neither the California statute nor the procedures provided by California law are so vague or standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and juries free to decide, without any legal fixed standards, what is prohibited and what is not in each particular case. (*Roth v. United States* (1958), 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 1511, 77 S. Ct. 1304; *Kingsley Books v. Brown, supra,* 345 U.S. 436, 441).

For the reasons stated, it is respectfully submitted that the appeal should be dismissed, or in the alternative, that the judgment and decree of the Court of Appeal should be affirmed.

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